Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208
	)	

COMMENTS OF
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Summary

IP-to-IP interconnection issues

The natural evolution of the public-switched network to a packet-switched network is not, by itself, a valid reason to abandon legacy regulatory protections for end users and competitors. Any attempt to undermine regulatory protections simply because network transmission protocols change over time is misguided and arbitrary.

Regulatory protections, including pro-competitive interconnection requirements, are vital so long as the marketplace for network facilities is not competitive, whether facilities are TDM or IP, fiber or copper, wireless or wireline. The question is not whether public networks are shifting to IP but whether IP somehow changes the fundamental economics of the network facilities on which IP technologies (just like "legacy" TDM technologies) depend – the trenches, poles, rights of way, conduit, fiber runs, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, rights of access to buildings, and all the other mundane but necessary inputs for any network.

Currently, "last mile" broadband networks are no more competitive than "legacy" networks, as the Commission pointed out in the National Broadband Plan. At most, some markets have local broadband duopolies but duopolies do not ensure just and reasonable rates, terms, and conditions for interconnection and end users, as economists have long recognized.

Absent robust competition, the Commission's proposal to rely on good faith negotiation as an intercarrier compensation mechanism is patently insufficient because

it does not prevent providers of “last mile” service from exploiting their market power in those negotiations.

8YY originating minutes

The Commission’s intercarrier compensation rules should continue to treat 8YY originating minutes as terminating minutes. Despite all the changes in technology, service offerings, and service providers that have emerged since the Commission adopted this rule over 25 years ago, it is still the case that the toll-free calling party chooses the access provider rather than the toll-free customer who pays for the call. Because this disrupts the link between customer and payor that disciplines service provider pricing, the Commission must restore the historic treatment of originating 8YY traffic before the scheduled reductions in terminating access charges begin.

Sunsetting the ARC and CAF

The FCC must implement a sunset schedule for the ARC and the intercarrier compensation-replacement CAF support mechanism. Funding for price cap carriers should end after three years; funding for rate of return carriers should end after five years. That schedule would balance more fairly the risk of carrier revenue under-recovery against the risk of overcharging customers. Absent a fixed sunset schedule, the Commission should ensure that reductions in the level of Eligible Recovery detailed in the *Order* are targeted first at inflated business multi-line ARCs until those charges are brought down to the level of residential ARCs.

Reform of end user charges

The cost rationale and regulatory context for SLCs have been fundamentally compromised in the decades since the Commission put SLCs in place as part of the original access charge regime. Changes in federal and state regulatory regimes, in the jurisdictional separation rules, in loop technologies, and in the nature of local exchange service justify reductions and eventual elimination of the SLCs.

The current rate levels for SLCs almost certainly exceed any level that would result from an interstate allocation of properly developed current loop costs. Specifying a SLC and ARC level will have no impact on the overall price charged to end users in states where retail prices have been de-regulated. And SLCs are nonsensical if carriers can pick and choose when to collect them based on different voice protocols.

As an initial step, the Commission should require carriers to include the SLC in advertised prices and exclude it from the "Fees and taxes" portion of a carrier's bill. For the growing number of customers whose voice service is simply another application running over the broadband facilities that they lease from their carriers, SLCs should be eliminated.

Pending complete elimination, SLCs should be reduced, particularly the SLCs of price caps carriers because of the differences between SLCs and other access elements falling under the FCC's price caps plan. Finally, the Commission should use existing sources of forward-looking cost data to reset SLCs at lower rates, with a rebuttable presumption for carriers who believe they can demonstrate a basis for higher levels.

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COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee (Ad Hoc) hereby responds to the Commission's invitation for comments in the Further Notice of Proposed Rulemaking in the dockets captioned above.[1]

[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-

I. INTERCONNECTION REQUIREMENTS SHOULD BE TRIGGERED BY MARKETPLACE COMPETITION, NOT TRANSMISSION PROTOCOLS

The natural evolution of the public switched network to a packet-switched network is not, by itself, a reason to abandon legacy regulatory protections, particularly for the end users of network services and infrastructure. Those protections, which include pro-competitive interconnection requirements, are necessary so long as the underlying marketplace dynamics for network facilities remain unchanged, whether those facilities use time division multiplexing ("TDM") or Internet protocol ("IP") technologies and whether transmission lines are fiber or copper, wireless or wireline. Where the market for network services continues to be characterized by high concentration and high entry barriers, the potential is low for competitive entry "in a timely, likely, and sufficient manner to counteract the exercise of market power."[2] Absent marketplace competition or the threat of competitive entry to discipline the pricing and practices of service providers in the market, the Commission must continue to regulate in order to protect end users and competition from unreasonable or anti-competitive behavior and outcomes.

The Commission should therefore reject self-interested calls for de-regulation by regulated network service providers so long as they are justified solely by the deployment of IP technology. The relevant inquiry for the Commission is not whether the public network is shifting from a circuit-switched to an IP environment but whether the deployment of IP can somehow change the fundamental economics of the network

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45, GN Docket No. 09-51, Report and Order and Further Notice of Proposed Rulemaking, FCC No.11-161 (rel. November 18, 2011) ("*FNPRM*").

[2] *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8635] (2010) (*Qwest Phoenix Order*).

facilities on which IP technologies (and TDM or any other transmission protocol) depend – such as trenches, poles, rights of way, conduit, fiber runs, copper loops, spectrum licenses, municipal permitting for disruptions of streets and pavements, easements, rights of access to buildings, and all the other mundane but necessary inputs for any network.

The FNPRM cites industry positions that reflect long-standing attempts to draw a bright line between “legacy” and “advanced” telecommunications services and to argue that the latter offer the potential for greater competition than the former and thus do not require intrusive price and other forms of economic regulation. As the Commission notes in the FNPRM, the larger incumbent LECs (“ILECs”) contend that, “whatever their historical marketplace position with respect to voice telephone services, their position with respect to IP services does not position them to use interconnection to disadvantage other providers, and does not warrant singling out incumbent LECs for application of legacy interconnection requirements."[3]

But the relevant consideration for purposes of developing an appropriate regulatory regime for an IP environment is not whether traditional voice and data services are now using different transmission protocols but whether the underlying local distribution facilities, on which even IP-based providers depend, are still characterized by extreme economies of scale and scope, formidable economic and other barriers to entry, and high market concentration if not actual monopoly. So long as the deployment of IP does not change the economics of those physical facilities , the Commission must establish and enforce

[3] *FNPRM* at para. 1339.

interconnection requirements and such other regulatory requirements as may be necessary to ensure just and reasonable rates, terms, and conditions for end users.

A. "Last mile" broadband networks are no more competitive than "legacy" networks

There is currently no indication that price-constraining competition is more evident in the last-mile broadband services marketplace than it has been for voice telephony and "legacy" data services. Indeed, the Commission concluded in the National Broadband Plan that monopolistic or duopolistic conditions for broadband service will prevail for 91% of the Nation's population. [4] Under these circumstances, the Commission understandably has expressed concern about broadband competition in the United States [5]

Some industry participants have sought to portray the introduction of IP and other packet switching technologies as a fundamental sea change in telecommunications technology that obviates the need for traditional regulatory protections. [6] IP is in fact far more evolutionary than revolutionary. Telecommunications is a little over a century old yet its short history has witnessed a steady progression of advances both in switching[7]

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[4] *Connecting America: The National Broadband Plan,* (www.broadband.gov/download-plan) at 37, Exhibit 4-A ("*NBP*"). The *NBP* states that 13% of households are served by only one broadband provider, 78% are served by two broadband providers.

[5] *NBP at* 37.

[6] *FNPRM* at para. 1339 ("[O]ther incumbent LECs contend that, whatever their historical marketplace position with respect to voice telephone services, their position with respect to IP services does not position them to use interconnection to disadvantage other providers, and does not warrant singling out incumbent LECs for application of legacy interconnection requirements."

[7] Switching evolved from manually-operated cord switchboards through electromechanical step-by-step switching to common control electromechanical crossbar switching and program-controlled electronic switches. The electromechanical and first generation electronic switching systems utilized what later became known as a "space division" architecture, in that a physically separate switching path was established for each call. Later generations of electronic switching utilized a "time division" architecture,

and transmission technology.[8] The common architectural element through all of these changes is the physical infrastructure of the network, which persistently consists of (a) local distribution facilities – often referred to as "last mile" facilities – that provide connectivity from individual customer premises (or, more generally, from the location of customer communications terminal devices) to the common switching and transport network, and (b) common transport and switching facilities that carry traffic from multiple customers and/or service providers between and among the endpoints of each connection. While technological change has altered the configuration of local distribution and common switching/transport networks,[9] the fundamental distinction between local distribution and common switching and transport facilities remains largely unchanged.

Competitive entry has had a far greater impact upon common switching and transport than upon ”last mile” facilities and this persistent marketplace reality has not been materially altered by the advent of IP or other "advanced" switching and transport technologies. Wires (whether copper, coax, or fiber optic) still need to be deployed on every street in every city and town nationwide -- millions of miles of streets, more than

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in which a "time slot" was assigned to each call within a larger bandwidth switching facility, allowing a connection between caller and called parties to be achieved by assigning both to the same time slot. These "time slots" were *synchronous* in that the slot assigned to each call would "arrive" at fixed intervals (e.g., at every 24th bit within a T-1 (1.544 mbps) data stream). Packet switching is another form of "time division" switching by which time slots are assigned *asynchronously* as each packet is assembled for transmission.

[8] Transmission technology has undergone a similar evolution, from a space division architecture in which each conversation was carried on a separate copper wire pair, through frequency-division multiplexing using carrier frequencies modulated by the voice signal, through synchronous time-division multiplexing (“TDM”) using fixed time slots, and on to asynchronous packet transmission protocols such as IP. The physical transport media also evolved, from multi-pair copper cables, through coaxial cables, fiber optics, and various wireless transmission technologies.

[9] For example, the development of very large capacity digital central office switches together with massive reductions in the unit cost of transport facilities have reduced the number of separate physical locations at which switching takes place

one hundred million homes, millions of business locations. Wireless transmitters (whether 3G, 4G, or LTE) still need to be installed on towers and rooftops and connected, most often with wires, to supporting networks. Advances in switching and transport technologies have had little impact upon the physical realities of "last mile" deployment and, consequently, little impact on the economic barriers to competitive deployment.

B. The emergence of local broadband duopolies does not ensure just and reasonable rates, terms, and conditions for interconnection and end users

While the economics associated with the construction and operation of local distribution infrastructure has continued to impede robust competitive entry into this sector, many local distribution markets (primarily for residential broadband service) have nevertheless evolved from monopoly to duopoly. However, this outcome is more of a fortuitous accident than the inevitable result of competitive economic forces. For decades, two parallel local communications distribution infrastructures existed – one for the distribution of telephone services and the other for the distribution of television signals. Although the telephone distribution infrastructure arrived earlier than that for cable TV, when first built the former could not support television, and the latter could not support telephony. The combined effect of higher bandwidth capacity transmission media (e.g., coaxial cable and optical fiber) combined with application-independent switching (e.g., IP) has broadened the content and applications network providers can offer, making it possible for telephone companies to offer video distribution services and for cable companies to offer telephony. And, of course, both can offer broadband Internet access.

As the Commission has pointed out, however, a duopoly is not much better at constraining market power than is a monopoly. "Economists, courts, and the Commission itself have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare." .[10] In an unregulated duopoly, tacit collusion is possible, and the degree to which firms collude to raise prices depends upon the balance between high pricing to obtain short term profits and moderating their pricing to forestall regulatory intervention that might jeopardize profits in the long term.[11] This kind of pricing cannot be expected to drive prices toward marginal cost. In markets with two principal firms (and with no other or at most limited competition by fringe competitors), both firms are "price-setters," not "price-takers" (i.e., both firms can actively control the market price). Acting in support of their own best interests, the firms will restrict output and charge a profit-maximizing price that will exceed the competitive equilibrium price, but likely be lower than the monopoly price.[12] In other words, if cable is the only actual competitor to the ILEC for the last-mile connection into the home, its presence is not likely to have any material effect in constraining either ILEC or cable prices and market power over "last mile" facilities, even in the absence of any (unlawful) concerted conduct.

Thus, as an economic matter, dominant last mile service providers such as incumbent local exchange carriers and incumbent cable television operators have the ability to dictate terms of interconnection and intercarrier payments (or even to deny

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[10] *Qwest Phoenix Order* at 8635-36.

[11] Armstrong, Cowan and Vickers, *Regulatory Reform, Economic Analysis and British Experience*, MIT Press, 1994, at 132.

[12] See W. Kip Viscusi, et al, *Economics of Regulation and Antitrust, Second Edition*, MIT Press, 1998, at 81, and discussion in chapter 5.

interconnection outright)unless constrained by regulation. The applications, content, and transport technologies that may be involved – TDM, IP, voice, data, video – do not alter this fundamental reality.

II. A "RIGHT TO GOOD FAITH NEGOTIATION" IS AN INADEQUATE INTERCARRIER COMPENSATION MECHANISM WHERE PROVIDERS EXERCISE MARKET POWER OVER "LAST MILE" FACILITIES

The Commission has concluded that the persistence of TDM-only interconnection is due to the lack of an intercarrier compensation mechanism for IP-to-IP interconnection, and that this distortion is retarding the pace at which ILECs migrate their own networks to IP:

> We conclude that the preexisting intercarrier compensation regime did not advance technology neutral interconnection policies because it provided LECs a more certain ability to collect intercarrier compensation under TDM-based interconnection, with less certain compensation for IP-to-IP interconnection.[13]

Ad Hoc agrees that the Commission should encourage IP-to-IP interconnection on economically efficient terms and should eliminate regulatory requirements that incent providers to resist such interconnection arrangements. But the regulatory solution proposed in the *FNPRM* is patently insufficient to protect end users who ultimately pay the price for over-priced or otherwise unreasonable carrier interconnection arrangements.

The *FNPRM* proposes that service providers seeking IP-to-IP interconnection be permitted to enter into voluntary interconnection contracts with a right to good faith negotiations. This approach will not produce just and reasonable rates, terms, and

[13] *FNPRM* at para. 1340.

conditions for interconnection because it does not prevent providers of "last mile" service from exercising their market power in those negotiations.

In many important respects, the need for regulatory intervention to assure reasonable and nondiscriminatory access for broadband providers to dominant carriers' "last-mile" infrastructure is far greater today than it was at the time that a contractual interconnection regime was established by the 1996 amendments to the Communications Act. At that time, Bell operating companies were not permitted to offer interLATA services and were thus indifferent as to which interexchange carrier ("IXC") or provider of information services an individual customer might select. By 2003, however, the BOCs had nominally satisfied the requirements for reentry into long distance in Sec. 271 of the Act and by 2005, the two largest independent long distance carriers (AT&T Corp. and MCI) had merged with the two largest RBOCs (SBC and Verizon).[14] By 2006, these now-integrated local/long distance carriers had all but eradicated any providers of long distance service that did not themselves control a significant local service customer base.[15]

At the same time, the Internet access market was shedding competitive participants and experiencing substantial vertical integration. In the pre-broadband Internet era, ILECs were not major players as Internet service providers ("ISPs"). Because customers in a dial-up ISP market could access any ISP, ILEC-provided dial-up Internet access conferred no particular competitive advantage on an ILEC's ISP

[14] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, FCC 05-183 (rel. Nov. 17, 2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, FCC 05-184 (rel. Nov. 17, 2005).

[15] Federal Communications Commission, Industry Analysis Division, Wireline Competition Bureau, *Trends in Telephone Service*, September, 2010, at Table 9.5.

operations and, as a result, ILECs could not exploit their local market power to create such an advantage. Once broadband became the standard form of Internet access and was de-regulated,[16] however, the owners of last-mile broadband access facilities – the ILECs and the cable companies – could bundle their last-mile connections with downstream Internet access. Under that integrated structure, the entity that controls essential last-mile facilities is decidedly *not* indifferent to its customers' choice of downstream service provider and has the ability to control those choices by impeding access to competing downstream providers. As the Commission observed in the *Qwest Phoenix Order*, "[t]"he Commission has long recognized that a vertically integrated firm with market power in one market…may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs."[17]

The *FNPRM* also acknowledges the anti-competitive incentives that result when an ILEC views an interconnecting party as a competitor. The ILEC has "no economic incentive ... to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[18] In that case, "[t]he inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power."[19]

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16 *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798 ("Cable Modem Declaratory Ruling"), *aff'd sub nom*. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) ("*BWIA Order*").

17 *Qwest Phoenix Order* at 8639-40.

18 *FNPRM* at para. 1337, *citing Local Competition First Report and Order*, 11 FCC Rcd at 15528, para. 55. *See also Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14818, para. 238 (1999)

19 *Id.* at note 2433.

Under current market conditions for “last mile” broadband facilities, the Commission cannot rely upon “good faith negotiations” to resolve IP-IP interconnection disputes unless it establishes unambiguous quantitative benchmarks against which the purported presence of “good faith negotiations” can be measured and, where necessary, enforced. To develop these benchmarks, the Commission should look for guidance to the process by which CLEC-ILEC negotiations and Sec. 252(b) arbitrations for unbundled network elements (“UNEs”) and related interconnection issues took place at the state level. In particular, Sec. 252(d) establishes “pricing standards” to govern state arbitration proceedings. Sec. 252(d)(1) requires that

> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

In addition to addressing interconnection and UNE costs pursuant to these requirements in individual arbitration proceedings, many state PUCs initiated generic UNE and interconnection pricing proceedings which established default rates that could be adopted in interconnection agreements in lieu of individual arbitrations. Ad Hoc urges the Commission to adopt similar safeguards for IP-to-IP interconnection.

III. THE COMMISSION SHOULD CONTINUE TO TREAT 8YY ORIGINATING MINUTES AS TERMINATING MINUTES

The *FNPRM* asks whether the Commission should continue the existing rule[20] for originating 8YY minutes under which the rate for terminating minutes applies.[21] That rule has been in place for over 25 years and the justification for the rule still pertains. For all of the reasons identified in the *Further Notice,* the Commission should retain the existing rule.

The Commission adopted the current treatment of 8YY traffic in 1986, as part of its effort to address uneconomic facilities bypass, i.e., substitution of alternative services in response to regulatory distortions in pricing rather than cost-driven economic differences.[22] A decade later, in the Access Reform Order, the Commission concluded once again that originating 8YY minutes should be treated as terminating minutes:

> By continuing to treat "open end" originating minutes as terminating minutes for access charge purposes, we recognize that access customers have limited ability to influence the calling party's choice of access provider. Accordingly, access charges for these "open end" minutes will be governed by the requirements we adopt in this Order applicable to terminating access provided by incumbent LECs.

Access Charge Reform, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (citations omitted).

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[20] 47 C.F.R. § 69.105(b)(I)(iii). “All open end minutes on calls with one open end (e.g., an 800 or FX call) shall be treated as terminating minutes.”

[21] *FNPRM* at para. 1303. The *FNPRM* also seeks data on the relative level of 8YY traffic compared to total access traffic. Examination of the quantity of queries routed to the national SMS/800 database SCPs may provide insight to the overall magnitude of 8YY calls.

[22] *See WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, CC Docket No. 86-1, Report and Order, FCC 86-115 (rel. Mar. 21, 1986) at para. 53.

Despite all the changes in technology, service offerings, and service providers that have emerged since the Commission adopted this rule, it is still the case that the calling party chooses the access provider rather than the toll-free customer who pays for the call. Because this disrupts the link between customer and payor that disciplines service provider pricing, the Commission must restore the historic treatment of originating 8YY traffic before the scheduled reductions in terminating access charges begin.

IV. THE FCC MUST ADJUST THE TRANSITION SCHEDULES AND PRICING FOR THE ARC AND CAF REPLACEMENT MECHANISM

The *Further Notice* seeks comment on a number of issues related to the future of the new access replacement charge ("ARC") and the intercarrier compensation-replacement CAF support mechanisms adopted in the *FNPRM.*[23] In particular, the Commission raised questions regarding the transition down and ultimate phase-out of those two ICC revenue replacement mechanisms. As the Commission noted in the *Order*, Ad Hoc objected to any revenue replacement mechanism in the ICC reform plan, particularly through increases in the SLC.[24] Having created revenue replacement mechanisms, despite the absence of any hard evidence that they are necessary (particularly for the largest price caps carriers that serve the vast majority of lines in the US), the Commission must, at a minimum, ensure that arbitrary revenue enhancers do

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[23] *FNPRM* at paras. 1326 – 1329.

[24] *FNPRM* at note 1777, *citing Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (*USF/ICC Transformation NPRM*), Comments of Ad Hoc Telecommunications Users Committee, filed April 18, 2011 ("*Ad Hoc USF/ICC Transformation NPRM Comments*") at 56-62.

not become a permanent part of the telecommunications landscape. The ARC and CAF must become time-delimited "transitional" elements for both price caps and rate of return ("RoR") carriers.[25]

The transitional ICC replacement mechanisms included in the *Order* are generous by any measure, essentially locking in and protecting LECs from the reductions on one side of a changing revenue equation (reductions in per-minute intercarrier compensation ("ICC") revenues) and ignoring revenue increases on the other side of that equation (additional revenues from new services and applications available over broadband facilities). The Commission must not allow that situation to continue for more than the limited time-frame carriers may need to adjust to a changed landscape. Ad Hoc's proposal below would shorten the time frame during which ILECs are guaranteed ICC replacement revenues, which will share more fairly some of the costs of reform (lost revenues) between those carriers and their shareholders that ultimately benefit from these changes and those end-user customers that have been targeted to fill the revenue-gap.

The Commission should allow ARC and CAF recovery from the price caps carriers for a period of 3 years. This is an adequate amount of time for planning and adjusting to the changes in the stream of revenues generated by per minute charges.[26] The existence of a known glide-path toward ICC reductions is sufficient for carrier

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[25] The Order included the CAF replacement mechanism sunset date of July, 2020 for price cap carriers that was originally proposed in the *ABC Plan*. No sunset was included for the Rate of Return carriers' use of the CAF ICC replacement mechanism or for the ARC for price cap or Rate of Return carriers. *FNPRM* at paras. 920, 1327.

[26] This schedule would end both the ARC and CAF by July 2015 for price caps carriers. The Commission's present schedule makes CAF ICC revenue replacement funds unavailable for price cap carriers effective through July 2020, and would allow revenue recovery from the ARC to continue beyond the foreseeable future subject to a decreasing "Eligible Recovery" amount.

planning purposes; the Commission need not ensure that the revenue replacement mechanisms remain in place until the completion of the scheduled per-minute transition. No other U.S. businesses facing a loss of consumer demand or forced to implement a reduction in prices (whether driven by the competitive marketplace or changing consumer preferences) has a guaranteed lock-in of pre-existing revenues for a three-year period while they adapt to changed market conditions.

Rate of return carriers, as always, present a slightly more complex picture. The Commission must implement a sunset date for the ROR carriers' use of ARCs and funding from ICC revenue replacement mechanism but with some additional refinements. Both ARC and CAF funding for RoR LECs should sunset in July 2017 – five years from the start of the reform of ICC charges. The Commission should allow carriers claiming a need for additional revenue support post-July 2017 to petition for additional time under the terms described at paragraphs 928 through 932 of the *FNPRM*.[27] The present schedule overvalues the potential risk that these carriers will not be able to operate profitably absent this support for at least another decade and discounts the harm to ratepayers from the collection and distribution of revenues to these carriers in excess of their need. By shortening the time frame during which ARC and CAF funds are automatically available to carriers to a term of five years, while still allowing recovery under circumstances of need, the Commission will strike a better balance of those risks.

The *FNPRM* asks whether "other modifications" would be appropriate for the ARC charges adopted in the Order given the transition to broadband and changes in

[27] Those paragraphs describe a carrier's ability to petition for a "Total Cost and Earnings Review."

carrier business plans.[28] As currently structured, the revenue generated by the ARC plans will be provided increasingly by business multiline subscribers. This occurs for two separate reasons. First, as demonstrated by the table below and, contrary to statements in the *FNPRM*, an increase in the combined multiline SLC/ARC cap from $9.20 to $12.20 does *not* make the proposed multi-line increase "comparable" to the maximum single line ARC of $3.00.[29] As the table demonstrates, the largest carriers providing most of the business multi-lines across the US have in excess of $5.00 "headroom" for implementation of ARC's that are above the current SLC but below the ARC/SLC Cap.[30]

ILEC	Approx. MultiLine SLC	ARC "headroom"
AT&T	$5.41	$6.79
Century (approx)	$6.50	$5.70
Frontier	$9.20	$3.00
Fairpoint	$6.23	$5.97
Verizon	$6.76	$5.44
RLECS	$9.20	$3.00

Second, the line count data reported by the Commission indicates that, over the decade from 1999 to 2008 (most recently reported data), ILEC-provided business exchange access lines grew both as a percentage of total lines and in absolute terms. While ILEC residential exchange access lines declined from 139-million to 72-million (almost a 50% decrease) ILEC business lines increased from 41-million to 45-million (almost a 10% increase).[31] Taken together, these elements drive increases in the ARC

[28] *FNPRM* at para. 1327.

[29] *FNPRM* at para. 909.

[30] SLC averages taken from FCC's *Trends in Telephone Service,* FCC WCB/IATD, September, 2010, accessed at http://www.fcc.gov/wcb/iatd/trends.html

[31] SLC averages taken from FCC's *Trends in Telephone Service,* FCC WCB/IATD, September, 2010, Accessed at http://www.fcc.gov/wcb/iatd/trends.html

for business multiline customers that should be mitigated in the additional adjustments the Commission is considering making to the ARC pursuant to the *FNPRM*.

Moreover, the *FNPRM's* reliance on earlier Commission findings to justify the disproportionately high business ARC is misplaced. The Commission had previously found that it was appropriate to set multi-line SLC caps higher than residential caps "because universal service concerns were not as great for multi-line business users."[32] As discussed in the next section, the SLC is designed to recover the costs associated with the provision of service to a subscriber. The Commission's decision to allow a higher business SLC cap was a decision to allow business users to pay the entirety of the costs they were causing the ILEC to incur on their behalf (up to the level of the higher cap). The ARC, on the other hand, bears no relationship to the costs incurred on behalf of the subscriber; it is nothing more than a new USF element dressed up as intercarrier compensation reform. The decision to collect more than twice as much subsidy from business subscribers than from residential is not based on cost recovery, equity, or anything in the record.

To the extent the Commission declines to adopt the ARC sunset dates proposed herein and allows the charge to continue in perpetuity subject to the reductions in the level of Eligible Recovery detailed in the *Order*, it should ensure that all reductions in the total recovery amount are targeted first at higher business multi-line ARCs until such time as those charges are brought down to the levels of the residential ARCs. If business subscribers are to bear a disproportionate share of ARC charges as the revenue replacement pool grows, they should also receive a disproportionate share of

[32] *FNPRM* at para. 911.

the reductions as that pool shrinks. If higher ARCs are assessed on business lines, the first downward movement in pricing should be to reduce the business charges to the level of residential line charges.

V. REFORM OF END USER CHARGES

The *FNPRM* asks for comment on the appropriate level and regulatory approach to end user charges, including subscriber line charges ("SLCs"), as carriers increasingly transition to broadband networks.[33] The Commission's analysis of those issues must begin with an accurate understanding of the original purpose served by the SLC and the costs it was designed to recover.

The SLC is a component of the price of exchange access service that is designed to recover the jurisdictionally interstate portion of the non-traffic sensitive ("NTS") costs of the local loops ILECs use to provide exchange access telephone service. Its existence as a separate line item charge on end user phone bills, rather than a contributing element to the bundled price of the service, is a function of the historical regulatory and political circumstances of its creation almost thirty years ago.[34]

At its inception, the SLC was based upon the interstate-assigned portion (roughly 25%) of the costs for subscriber loops, the twisted-pair copper wires that connect the customer's premises with the ILEC's central office. The balance of the loop costs – the

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[33] *FNPRM* at paras. 1326, 1330-1333.

[34] As Ad Hoc has stated in prior filings, costs directly associated with local telephone access generally fall into three broad categories: (1) those that are driven by the aggregate level of usage (e.g., minutes-of-use ("MOUs")) of the common local access and transport network; (2) those that are driven by the concurrent capacity demand placed on the common network; and (3) those that do not vary with either the usage (MOUs) or capacity demand placed on the common network. Those costs exhibiting the characteristics of the first two categories were classified as "traffic sensitive" ("TS") while those that did not vary with usage or demand were classified as "non-traffic sensitive" ("NTS") in the initial access charge rate structure adopted in 1984. *See generally Ad Hoc USF/ICC Transformation NPRM Comments* at 57-58, and in the *USF/ICC Transformation NPRM* at paras. 47-49, n. 32 and orders cited therein.

portion assigned to the intrastate jurisdiction – was expected to be recovered through local monthly exchange service rates set by the appropriate state regulatory body. The question before the Commission now is whether the continuance of a two-part price for exchange access service makes any economic sense in 2012.

A. The rationale and regulatory context for SLCs have been compromised

In the decades since the Commission put the access charge regime in place, there have been dramatic changes in the economy, in the federal and state regulatory regimes, in the jurisdictional separation rules, and in loop technologies. The *FNPRM* asks whether ongoing technological changes in the manner in which voice services are delivered to subscribers (changes in the nature of local exchange service) justify changes in the long-term treatment of SLCs.[35] But an equally important question is whether the long-term treatment of SLCs should change as a result of changes in the regulatory regimes affecting LECs at both the state and federal levels, changes that have dramatically altered the local exchange pricing paradigm in the nearly three decades since the inception of the SLCs. [36]

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[35] *FNPRM* at para. 1326, 1330-1333.

[36] At the federal level, rate of return regulation was replaced by price cap regulation some twenty years ago for the lion's share of all lines subject to SLCs. *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *rev'd and remanded*, *Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001). Different legislative and administrative regulations apply to the offering of exchange access service for residential and business subscribers across the 50 states. In the vast majority of cases, the putatively state-regulated portion of the price for business exchange access services is no longer regulated at all while residential exchange access has been deregulated in some cases and subjected to some alternative form of regulation in most others. See *State Retail Rate Regulation of Local Exchange Providers as of December 2006,* NRRI. Accessed at http://nrri.org/pubs/telecommunications/07-04.pdf

Despite these changes, the rate structure of today's SLC is conceptually sound, for all of the reasons identified by the Commission when it created the charge: it is an NTS (flat-rated) charge for the recovery of NTS costs and it is assessed against the "cost causer," i.e., the economic party (the subscriber) who causes the cost to be incurred. For this reason, Ad Hoc has long supported the concept of the subscriber line charge as an appropriate recovery mechanism for interstate NTS loop costs. [37]

Ad Hoc no longer supports the Commission's imposition of SLCs for "last mile" facilities because the cost rationale and regulatory context for SLCs have been substantially undermined since the charge was first established, in a variety of ways.

First, the current rate levels for SLCs almost certainly exceed any level that would result from an interstate allocation of properly developed current loop costs, as discussed in greater detail in the next section.

Second, it makes little sense for the Commission to invest time and resources in an effort to specify the level of SLCs and ARCs based on an interstate allocation of line costs when the state portion of the price (for the remaining 75% of the loop costs) is deregulated. In that circumstance, setting the rate for one piece of a total loop price by regulatory mandate will have no impact on the overall price charged to end users or the revenues generated by total loop charges. If, for example, a carrier with deregulated state prices for business PBX trunks requires $50 to cover its costs (or decides that $50 is the revenue-maximizing price for the service) and the federal SLC is set at $8, the advertised "state" portion of the price can simply be set at $42. In that same scenario, if

[37] The FCC's Third Report and Order in Docket 78-72 adopting the use of End User Common Line charges (later known as SLCs) for the recovery of NTS loop costs references Ad Hoc's 1982 support of that plan. *See MTS and WATS Market Structure,* Third Report and Order, 93 FCC 2d 241, 277 n. 42 (1983).

the federal SLC dropped to $7, the carrier could (and should be expected to) increase the "state" price to $43. From a consumer welfare perspective, there is no difference in the two scenarios; in either case, the consumer will pay a total of $50 for its exchange access line. In short, the rate level for SLCs mattered in an age of state rate regulation. It does not today.

Finally, the SLC rules do not work in a world where a fiber optic loop can be subject to, or exempt from, the SLC depending upon the protocol used to deliver the customer's voice traffic to its ultimate destination (as opposed to any cost-causative characteristic of the non-traffic sensitive plant the SLC is designed to cover).[38] The transition to broadband for all of the nation's customers may not be complete, but it is far enough along to have rendered the SLC obsolete. Exchange access customers – be they residential or business, uninformed or sophisticated about their technology choices – should not be making service and technology choices based upon improper price signals sent by an outdated SLC regime.

B. SLCs should be eliminated over time

The *FNPRM* asks whether the Commission should eliminate SLCs altogether and if so over what time frame.[39] An appropriate solution to the SLC problem for all

[38] For example, Verizon charges a SLC for voice service provided over FiOS lines for some versions of its service but not others. Verizon FiOS customers that purchase voice service over FiOS fiber-optic lines are charged a SLC if they subscribe to, for example, Verizon Freedom Essentials for their voice service but are not charged a SLC if they subscribe to Verizon Digital Voice. Presumably Verizon considers one service to be a traditional exchange access service (although the voice traffic is transmitted over the fiber via some packet-based protocol similar to IP if not IP) and the other as an "over the top" VoIP offering. *See* *http://businessforums.verizon.net/t5/Home-Phone-Landline-or-Digital/Freedom-Essentials-vs-Digital-Voice/td-p/113026*, last visited Feb. 24, 2012.

[39] *FNPRM* at 1332.

carriers in all regulatory situations is not obvious and will likely require several steps by the Commission.

The first and easiest step is to require carriers to include any SLC (or SLC and ARC) in the advertised price of exchange access services, (as is proposed in the *FNPRM* at para. 1334). The Commission should require not only that the SLC be included in any advertised price but also that the charge be moved from the "Fees and taxes" portion of a carrier's bill to the "Service" portion of the bill.[40]

Second, while the Commission fashions an appropriate long-term SLC strategy, including revisions to the level of the SLCs, it should take immediate steps to clarify that the SLC is not a mandatory charge, particularly for carriers subject to price caps rather than a cost-based ratemaking regime. The current requirement that LECs must charge SLCs as a separate rate element in conjunction with the provision of exchange access is an anachronism. If the Commission clarifies that SLCs are a rate element that carriers may, but are not required, to charge end users, LECs would no longer be able to claim that "the FCC makes me do it."

Ultimately, however, SLCs should be eliminated for all exchange access services for which rate regulation at the state level has been eliminated, for the reasons discussed above. For exchange access services sold by price caps carriers, the Commission should adopt a rebuttable presumption that the exchange access services are not price regulated at the state level and eliminate the collection of SLCs absent a showing that state regulations prevent the LEC from adjusting its exchange access

[40] The ability to know the total price of a given service is increasingly important to business and residential subscribers as they attempt to make informed decisions about comparable services provided over different transmission media using differing protocols, some of which have a SLC applied and some of which do not.

prices to recoup that revenue. If business and residential exchange access services are afforded differing regulatory treatment within a particular state, the SLC treatment should vary accordingly.

Additionally, for the growing number of customers whose voice service is simply another application running over the broadband facilities that they lease from their carriers, SLCs should be eliminated. While traditional voice service may be regulated at the state level, so-called 'over the top' VoIP services are not regulated today and are unlikely to be regulated in the future. Unless and until the Commission decides it is appropriate to regulate broadband service offerings as basic telecommunications (which Ad Hoc has advocated in this docket[41]), the application of SLCs to service provided over broadband facilities is inconsistent with the de-regulatory treatment of that service. [42] If the Commission determines that a SLC should apply to broadband facilities, the SLC should be applied to the broadband facility itself, not to a voice application running over the broadband facility. SLC's were originally put in place to ensure that the "users of the local telephone network should be responsible for the costs that they actually cause."[43] The non-traffic sensitive costs of a broadband access line are the same regardless of whether the traffic running over it is entirely comprised of voice packets, or video game packets, or some mixture of the two. Applying a SLC to those customers that send voice packets but not to those who do not is arbitrary and capricious.

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41 Ad Hoc *USF/ICC Transformation* Comments at 12 – 14.

42 Moreover, to the extent that the Commission treats broadband access facilities as entirely interstate in nature and declines to regulate them, it is unclear that SLCs should ever apply to voice services provided over broadband facilities like Verizon's FiOS and AT&T's U-Verse since the loop plant itself has been deregulated. Footnote 185 of the *FNPRM* acknowledges that the Commission currently does not regulate rates for broadband Internet access service.

43 *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 97 F.C.C.2d 682, 686, 690-691 (1983)

C. SLCs should be reduced in the interim

The SLCs of price caps carriers deserve particular attention because, unlike the other access elements falling under the FCC's price caps plan, the SLC "caps" in the Commission's rules are not ceilings up to which prices may float based upon a carrier's discretion. Rather they are caps on the amount of loop costs that may be recovered from the SLC element based upon a long-ago version of the individual carrier's cost characteristics.[44] Whether the SLC element in a particular carrier's tariff is "at" or "below" the SLC cap is a function of that carrier's historic loop costs (density, loop length, etc.). The last time the Commission examined these costs in any kind of meaningful manner was *before* the price caps plan was instituted for LECs in 1991.[45] Changes between 1991 and the adoption of the CALLS plan in 2000 were formulaic and did not involve any examination of costs. For the past decade, SLC prices have remained frozen.

The *FNPRM* asks "whether the magnitude of carriers' revenues currently associated with the common line are appropriate, or too high (or low)" and whether forward-looking costs should be used in evaluating SLC levels.[46] The SLC rates in effect today were set premised upon the LECs' historic embedded accounting costs. Were the Commission to undertake a detailed examination of the accounting costs associated with a subscriber's loop for price caps carriers today and allocate a portion of those costs to the interstate jurisdiction, it is likely that the resulting cost would be something

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[44] 47 CFR Part 69.152 (for price caps Carriers) and 47 CFR Part 61.3 (d) and 61.3 (cc). 47 CFR Part 69.104 contains the SLC regulations for Rate of Return Carriers, but the discussion here is directed at price caps carriers.

[45] *Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990).

[46] *FNPRM* at 1331.

far lower than the SLC rates in place today. Such data is not readily available for the price caps LECs, of course, since the Commission granted petitions to forbear from collecting cost information. But the Commission has two sources of forward-looking cost data available for determining the costs of the traditional exchange access lines for which the SLCs were designed. Either (or both) of the following sources could be used to derive data sufficient to reset SLC rates, with a rebuttable presumption that the rates are appropriate:

1) The High Cost Model ("HCM") used to determine High Cost loop support for non-rural carriers as part of the USF funding mechanism generates forward-looking loop costs.

2) UNE loop prices currently used in interconnection agreements. These prices are based upon forward-looking cost data and have the added advantage that either the LEC voluntarily agreed to them or they were adjudicated during arbitration. The rates found in the most recent UNE rate summary that Ad Hoc has been able to obtain would result in a weighted average SLC rate approximately one third lower than the SLCs in place today.[47]

Applying the 25% federal loop allocation factor to the loop costs generated by the HCM would yield a new SLC rate level that could be utilized for price caps carriers in place of the outdated SLC rates until such time as the Commission eliminates SLCs entirely or requires new cost studies from the LECs.

CONCLUSION

The Ad Hoc Telecommunications Users Committee urges the Commission to address in accordance with the analysis provided above the issues identified in the

[47] A 2006 nationwide survey as of March 2006 revealed a nationwide weighted average price for UNE loops and UNE Ports of ($13.53 and $2.59). Twenty-five percent of the weighted average rate of the UNE loop plus port was $4.03. The nationwide average SLC rate of $5.71 reported in the same document was more than 40% higher. See *A SURVEY OF UNBUNDLED NETWORK ELEMENT PRICES IN THE UNITED STATES,* Billy Jack Gregg, March, 2006. Accessed at *http://warrington.ufl.edu/purc/research/UNEdata.asp.*

Further Notice of Proposed Rulemaking regarding IP-to-IP interconnection, toll-free calling charges, phasing out the access recovery charge and intercarrier compensation-replacement CAF support mechanism, and the reform of subscriber line charges.

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Certificate of Service

I, Michaeleen Terrana, hereby certify that true and correct copies of the preceding Comments of AdHoc Telecommunications Users Committee were filed this 24th day of February, 2012 via the FCC's ECFS system.

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